

**U.S. Department of Labor**

**Board of Alien Labor Certification Appeals  
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Washington, DC 20001-8002**

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Date: October 9, 1998

**Case No. 97 INA 150**

*In the Matter of:*

**DEAN C. WOO AND ASSOCIATES,**  
*Employer,*

*on behalf of*

**EMILY SY,**  
*Alien.*

Appearance: W. J. Chernick, Esq., of Encino, California, for Employer and Alien.

Before : Huddleston, Lawson, and Neusner  
Administrative Law Judges

FREDERICK D. NEUSNER  
Administrative Law Judge

## **DECISION AND ORDER**

This case arose from a labor certification application that was filed on behalf of ma CHIH KUN CHAI ("Alien") by NEUROGEN CORP., ("Employer") under § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a) (5)(A) ("the Act"), and the regulations promulgated thereunder, 20 CFR Part 656. After the Certifying Officer ("CO") of the U.S. Department of Labor ("DOL") at Boston, Massachusetts, denied the application, the Employer appealed pursuant to 20 CFR § 656.26.<sup>1</sup>

Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose

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<sup>1</sup>The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c). Administrative notice is taken of the Dictionary of Occupational Titles, published by the Employment and Training Administration of the U. S. Department of Labor.

of performing skilled or unskilled labor may receive a visa, if the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U. S. worker availability.

## STATEMENT OF THE CASE

On October 28, 1994, the Employer applied for alien labor certification for the permanent full time employment of the Alien as an "Accountant" in its Accountancy Firm with the following duties:

Prepares financial reports in order to generate cost analysis, budgets, cash flow projections, schedules of accounts payables and receivables. Prepares financial analysis. Meet with auditors and prepares accounting reports for their review. Updates and advises on tax advantages relating to inventory control and other similar aspects. Enters and applies information onto computer by using DAC-EASY. Report to management concerning the scope of all audits including receivables and inventory discrepancies.

AF 109, box 13. (Copied verbatim without change or correction.) The educational requirement was a baccalaureate degree in the Major Field of Study of Business Administration/Accounting, plus two years of experience in the Job Offered. *Id.*, box 14. The position was classified as an "Accountant" under DOT Occupational Code No. 160.162-018.<sup>2</sup> The Other Special Requirements were the following:

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<sup>2</sup> **160.162-018, ACCOUNTANT (profess. & kin.) Applies principles of accounting to analyze financial information and prepare financial reports: Compiles and analyzes financial information to prepare entries to accounts, such as general ledger accounts, documenting business transactions. Analyzes financial information detailing assets, liabilities, and capital, and prepares balance sheet, profit and loss statement, and other reports to summarize current and projected company financial position, using calculator or computer. Audits contracts, orders, and vouchers, and prepares reports to substantiate individual transactions prior to settlement. May establish, modify, document, and coordinate implementation of accounting and accounting control procedures. May devise and implement manual or computer-based system for general accounting. May direct and coordinate activities of other accountants and clerical workers performing accounting and bookkeeping tasks. GOE: 11.06.01 STRENGTH: S GED: R5 M5 L3 SVP: 8 DLU:88**

1. Prior experience in cash flow & budgetary projections
2. Inventory control experience
3. Internal auditing background
4. Financial analysis experience
5. DAC-EASY experience

*Id.*, Box 15. The position consisted of forty hours per week from 8:00 AM to 5:00 PM, with no overtime. The salary offered was \$33,000, per year. *Id.*, boxes 10-12.<sup>3</sup> After the job was posted and advertised, eight U. S. workers applied for the job, but none of them was hired. AF 108.

**Notice of Findings.** On October 24, 1995, the CO's Notice of Findings ("NOF") denied the application, subject to the Employer's rebuttal. Citing 20 CFR §§ 656.20(c)(8), 656.21(b)(2), and 656.21(b)(6), the CO found that at least one U. S. worker, Mr. Maitland, was apparently qualified for the position and had been rejected for reasons that were neither lawful nor job related. The CO said the Employer's contact letter to this U. S. worker required "written references substantiating his familiarity with respect to areas mentioned earlier in this letter" to confirm his qualifications for the job. The CO explained that this applicant's resume showed a broad range of experience, education and training, adding

This background raises the reasonable possibility that the applicant is qualified[. A]lthough his resume does not expressly state that he meets all the job requirements, an employer bears the burden of further investigating the applicant's credentials. However, the burden is not on the applicant to come forth and prove his qualifications, as employer sought to do. Instead, it is employer's burden to investigate the U. S. worker's abilities and credentials in a good faith manner.

AF 106. The CO said, "Such language in an applicant contact letter represents an irregular business practice that seems primarily intended for the purpose of putting off and discouraging further interest in the job by a seemingly qualified applicant. [20 CFR §] 656.21(b)(6)." In addition, said the CO, this letter's demand also constituted a previously undisclosed requirement, which the Employer failed to include in the application, adding,

Timing the introduction of such a previously undisclosed and irregular requirement with the initiation of the applicant contact letter serves only to surprise and discourage a

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<sup>3</sup> The Alien was born in 1953 and was a National of the Philippines, and was in the U. S. under an H-1 visa. She completed a baccalaureate degree in Business Administration/Accounting in 1974. She worked as an accountant for various businesses in the Philippines from 1979 to March 1992. From January 1993 to April 1993 she worked as an accountant for a business in California. She was employed as an accountant by the Employer from September 1994 to the date of application. The work that the Alien performed as an accountant prior to being hired by the Employer was similar to the job duties described in the Application.

seemingly qualified U. S. worker's further interest in the job opportunity.[20 CFR §§] 656.21(b)(2) and 656.21(b)(6). The employer cannot lawfully reject the seemingly qualified U. S. worker based on a recruitment contaminated with a lack of good faith. [20 CFR §] 656.21(b)(6). Such a recruitment indicates the job opportunity is not clearly open to any qualified U. S. worker. [20 CFR §] 656.20(c)(8).

AF 106. The NOF then described in detail the evidence required for Employer to rebut these findings.

**Rebuttal.** The Employer's December 1, 1995, rebuttal addressed the issues noted in the NOF. AF 89-103. The rebuttal, which was summarized in a letter by Employer's counsel, consisted of statements by an officer of the Employer and by an officer of a "job placement agency," who discussed business custom regarding the requirement of references from job applicants. Employer argued that BALCA has held that an employer may request verification of employment history and educational credentials, and may reject a job applicant based on the failure to provide such verification. The Employer's owner apparently contacted Mr. Maitland after the NOF was issued, and he alleged that he was then told that the worker now had a job at a rate of pay and under working conditions superior to the job it had offered. The Employer stated that it had rejected Mr. Maitland because he failed to respond to its letter of April 6, 1995.

**Final Determination.** On March 6, 1996, the CO summarized the NOF and the Employer's rebuttal in the Final Determination, and concluded that Employer's rebuttal failed to correct the defect discussed in the NOF. The CO then noted that Mr. Maitland had a baccalaureate degree in Business Administration, Management/Accounting, and asserted approximately eighteen years of experience in Finance and Accounting in his resume. That experience, noted the CO, included preparation of financial statements; performing audits; preparation and implementation of budgets; tax accounting (during two years with a CPA firm); comprehensive institutional, financial and business operation of state government enterprises; supervision of purchasing; and financial software background. AF 85. Referring to the broad range of the U. S. applicant's experience, the CO observed that, even though his resume did not expressly state that he met all of Employer's job requirements, the Employer had the burden to investigate Mr. Maitland's abilities and credentials in good faith. The CO concluded that the letter to this worker was discouraging and foreclosed further productive investigation of his qualifications by its declaration that the worker must be prepared to provide Employer with written references to substantiate his "previous documented experience" with the Job Duties and Special Requirements stated in Employer's application.

The CO relied on **Harding Lawson Associates**, 90 INA 457 (Dec. 10, 1992), which affirmed the CO's denial of certification in a case where an employer informed applicants that they did not qualify for the job offered unless added information as to their qualifications could be submitted, noting both the employer's obligation to investigate the job seekers' credentials and its burden of proof regarding qualifications. Noting that BALCA further held that such letters to applicants constituted an irregular business practice designed to discourage them from

pursuing the job offer and supporting the inference that the position was not clearly open to U. S. workers, the CO concluded that **Harding Lawson Associates** governed the instant case, if the facts of record supported such a finding. AF 87. Again quoting the relevant language from Employer's rebuttal letter, the CO said,

This request is not undertaken after or during the interview, but upon the U. S. worker's first introduction to petitioner by his resume. Such a reception would be chilling to almost any U. S. worker.

The CO added that the effect of this request was greater because it was made at the time contact with the job applicant was initiated, since this condition was not mentioned in either the advertisement or the posting of this position. Addressing the good faith of Employer's recruitment effort further, the CO observed that it had made no further documented efforts to establish timely direct contact with Mr. Maitland before rejecting him, and that it rested entirely on this discouraging letter.<sup>4</sup> The CO then rejected Employer's proof that its behavior was not irregular, explaining that the rebuttal argument and evidence did not apply to the facts of this case, where the Employer "at first introduction by resume" had required the worker to submit written verification of qualifications without having even interviewed the candidate. Reasoning that the Employer had rejected a seemingly qualified U. S. worker based on a recruitment that was contaminated with a lack of good faith, the CO concluded that the position offered was not clearly open to any qualified U. S. worker within the meaning of 20 CFR §§ 656.20(c)(8), 656.21(b)(6).

**Appeal.** On April 8, 1996, the Employer appealed and filed a brief, claiming error in the CO's findings of fact and law. AF 01-82.

## Discussion<sup>5</sup>

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<sup>4</sup> The CO cited *Foothill International, Inc.*, 87 INA 637 (---, --, 19--), at this point.

<sup>5</sup> The Panel takes note of the policy expressed in § 212(a)(14) of the Immigration and Nationality Act of 1952, which was enacted to exclude aliens competing for jobs U. S. workers would fill and to "protect the American labor market from an influx of both skilled and unskilled foreign labor." *Cheung v. District Director, INS*, 641 F2d 666, 669 (9th Cir., 1981); *Wang v. INS*, 602 F2d 211, 213 (9th Cir., 1979). To achieve this Congressional purpose the Department of Labor ("DOL") adopted regulations setting forth a number of provisions designed to ensure that the statutory preference favoring domestic workers is carried out whenever possible. In addition the DOL incorporated into 20 CFR § 656.2(b) the text of § 291 of the Immigration and Nationality Act, 8 U.S.C. § 1361, which provides that, "Whenever any person makes application for a visa or any other document required for entry, or makes application for admission, or otherwise attempts to enter the United States, the burden of proof shall be upon such person to establish that he is eligible to receive such visa or such document, or is not subject to exclusion under any provision of this Act. ..."

The issue presented is based on the CO's finding that the Employer's rejection of a seemingly qualified U. S. worker arose from recruitment actions that led the CO to conclude that the position offered was not clearly open to any qualified U. S. worker within the meaning of 20 CFR §§ 656.20(c)(8), 656.21(b)(6). Employer's brief correctly inferred that the offending language in its contact letter told the responding job applicants to be prepared to provide it with written references substantiating the workers' familiarity with areas of "previous documented experience," including cash flows and budgetary financial statement analysis and knowledge of DAC-EASY accounting software. AF 133. In Mr. Maitland's case the Employer addressed this precondition to a job applicant whose experience in accounting at all levels extended over a period of eighteen years from 1976 to the date of application. AF 128-130. His resume provided names, addresses, and telephone numbers of seven individuals whom he described as his "references." AF 131. In addition to identifying his references, the details of his duties in his former positions, and the "special training" he had received during his career, Mr. Maitland indicated that further references were "Available upon request" at the bottom of AF 129. As Mr. Maitland clearly was willing to produce such written references for any prospective employer who contacted him and his resume and qualifications were superior to those of the Alien and the other U. S. candidates, the condition stated in the Employer's letter was pointless, and its objective in this context was questionable.

The conflicting evidence in the Appellate File became significant for this reason. The Employer proved that a letter was sent by Certified Mail and that it received a Return Receipt. The documents it furnished are not compelling evidence because the Addressee Signature on the Return Receipt is illegible and, to the extent any part of it can be read, the signature indicating the receipt of this document is obviously different from the signature of Mr. Maitland on the questionnaire he signed and returned to the state employment security agency. Because the Return Receipt on AF 134 did not establish conclusively that Mr. Maitland received Employer's contact letter, the Panel turned to the state agency's questionnaire in determining whether or not it ever arrived. On May 26, 1995, Mr. Maitland affirmatively stated in writing over his clear, handwritten signature that the Employer had not contacted him, that he did apply for this job, that he was never scheduled for an interview by the Employer, and that the Employer did not interview him. Finally, although Mr. Maitland felt he met the requirements of the position, the Employer did not offer him the job. AF 127. These answers were entirely inconsistent with Employer's representations in reliance on AF 134 that its letter did arrive and that Mr. Maitland was rejected for the job for the sole reason that he had never responded to that letter.

Moreover, the rebuttal letter of the Employer's owner is relevant only in the prefatory remark, "Mr. Maitland stated that at the time he was contacted about the job (April 10, 1995), ..." <sup>6</sup> AF 92-95. This statement is not persuasive evidence that Employer's letter actually was received by Mr. Maitland, himself, on April 10, 1995, or on any other date; and it is contradicted by Mr. Maitland's written statement to the contrary on an earlier date. First, Mr. Woo did not

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<sup>6</sup> Mr. Woo's remaining allegations have nothing to do with the CO's finding, and they amount to an after the fact rationalization that is not self-proving.

give the date of his purported conversation with Mr. Maitland, which can only be inferred from the date of his rebuttal and the content of the document he offered. Second, because his statement is a self-serving assertion by an interested party it is given less credibility. Third, even if Mr. Woo's statement were given weight in spite of his partisan interest in the outcome of this matter, this document does not convey an affirmative statement by Mr. Maitland that he received the contact letter at any time before the Employer rejected his application for the job at issue.

**Conclusion.** The Panel finds Mr. Maitland's reply to the questionnaire is more credible than Mr. Woo's account of a purported telephone conversation because it is closer to time of the events described. In addition, the Panel has inferred from Mr. Woo's rebuttal statement that he was able to reach Mr. Maitland by telephone promptly and effortlessly after the NOF was issued, and we have considered this with the Employer's failure to attempt to reach this job applicant by telephone before rejecting him several months earlier. This evidence has led us to agree with the CO's decision to give little, if any, credence to Employer's assertion that Mr. Maitland was rejected solely because he never responded to its contact letter, an explanation that the CO reasonably found to be patently ingenuous. It follows that the CO's finding that the Employer rejected a seemingly qualified U. S. worker for reasons that were neither lawful nor job related was based on the evidence of record, and the Employer's arguments and evidence to the contrary did not sustain its burden of proof. As a result, the Panel concludes that the evidence in the Appellate File supported the CO's denial of alien labor certification. Accordingly, the following order will enter.

## **ORDER**

We hereby affirm the Certifying Officer's denial of alien labor certification.

For the Panel:

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FREDERICK D. NEUSNER  
Administrative Law Judge

**NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW:** This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk  
Office of Administrative Law Judges  
Board of Alien Labor Certification Appeals  
800 K Street, N.W., Suite 400  
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.